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In the Supreme Court of the United States.

OCTOBER TERM, 1922.

FEDERAL TRADE COMMISSION, petitioner,
v.
SINCLAIR REFINING COMPANY, respondent.
No. 213.

FEDERAL TRADE COMMISSION, petitioner,
v.
STANDARD OIL COMPANY (NEW JERSEY), respondent.
No. 637.

FEDERAL TRADE COMMISSION, petitioner,
v.
GULF REFINING COMPANY, respondent.
No. 638.

FEDERAL TRADE COMMISSION, petitioner,
v.
MALONEY OIL & MFG. COMPANY, respondent.
No. 639.

BRIEF FOR PETITIONER.

STATEMENT.

These cases come to this court on writs of certiorari to review judgments of the Circuit Court of Appeals for the Third Circuit and Circuit Court of Appeals for the Seventh Circuit, which judgments set aside orders of the Federal Trade Commission requiring these respondents, refiners, and/or wholesale marketers of gasoline, to cease and desist from leasing to retail dealers underground tanks with pumps for storing and dispensing gasoline for a nominal consideration and with covenant that the equipment should be used only for storing and selling gasoline purchased from the respondents and from continuing to operate under such leases outstanding.

The cases at bar were four out of more than thirty similar proceedings instituted and prosecuted practically simultaneously by the Commission for the purpose of determining the legality of the practice involved. In approximately thirty of these proceedings orders practically identical with those entered in the cases at bar were issued.

Effect of consolidation of cases on the record before the court.

These cases comprise four of a considerable group of proceedings by the Federal Trade Commission, involving the same practice to be described below.

Testimony in the entire number of cases was taken in three groups, one of which bore most directly upon gasoline marketing companies, respondents before the Commission, in the States along the Atlantic seaboard. Another group related most directly to respondents doing business within the State of Ohio, and the third group concerned respondents doing business in territory farther West.

As regards the cases in what might be called the eastern group, of which the notice of hearing was duly given to the three respondents in the cases coming from the Third Circuit, the Commission entered an order for the combination of some twelve cases. This was for the reason that the evidence in support of the Commission's complaints would be, in most respects, identical, and for the purpose of securing expedition. (Maloney Rec., Vol. I, p. 17.) [1]

At the opening of the taking of testimony upon the group of twelve cases, to which the three cases before the court from the Third Circuit belonged, it was clearly understood that the testimony as regards the practice and its effect upon competition would be applicable against all of the various oil companies belonging to that group. Questions, however, of the interstate character of the competition and con-

[1] In referring to the records in this brief the following abbreviations will be used: "Standard Rec., Vol. I, Vol. II, Vol. III" refers to record Standard Oil Company of New Jersey, Volume I, etc.; "Gulf Rec., Vol. I, Vol. II" refers to record Gulf Refining Company, Volume I, etc.; "Maloney Rec., Vol. I, Vol. II" refers to record Maloney Oil & Mfg. Company, Volume I, etc.; "Sinclair Rec." refers to the record in the Sinclair case.

sequent jurisdiction of the Commission were to be covered by stipulation or special testimony. (Standard Rec., Vol. II, pp. 5, 7.)

Counsel then present proceeded with the hearing without objection to this plan, and at the close of the hearing counsel for certain of the respondents then before the Commission, including the Standard Oil Company of New Jersey, moved to augment the record of the eastern group of cases by the incorporation of the testimony previously taken in the Ohio group of cases. (Standard Rec., Vol. II, pp. 604, 605.) The sole ground for such action was that evidence for or against the practice was applicable for or against all companies employing it.

It is clear, therefore, that all evidence in Volumes II and III of the record before the court coming from the Third Circuit, pertaining to the effects of the practice, is applicable against the Standard Oil Company of New Jersey. The Maloney Oil & Mfg. Company and Gulf Refining Company were not represented when the motion was made before the Commission to add the testimony in the Ohio record to that taken in the eastern group of cases, and they were therefore not included in the favorable action by the Commission on that motion. Hence Volume III of the record before the court from the Third Circuit is not a part of the Maloney and Gulf Refining cases.

The record in the Sinclair Refining case, coming from the Seventh Circuit, stands alone so far as that company is concerned.

The practice in question.

The cases at bar relate solely to the legality of a practice which has been widely indulged in throughout the eastern one-third of the United States by corporations refining and/or marketing gasoline at wholesale. The practice consists in the leasing to retail dealers in gasoline, for a nominal consideration, of equipment for the storage, measurement, and delivery of gasoline to the consumer. The leases are written, run in favor of the retail dealer, and contain a covenant restricting the lessee to the use, in the equipment leased, of the products of the leasing corporation solely. The provision objected to is that by which the parties agree that:

> The lessee or borrower shall not place in such devices or use in connection with such devices or their equipments (referring to the pump and tank equipment) any refined oil or gasoline of a competitor.

The record shows without contradiction that the practice has not been indulged in in the western half of the United States nor to any great extent west of the State of Ohio.

Inasmuch as the complaint, the evidence, and the findings are all to the effect that the lessees, except large garagemen in the more populous towns and cities, will not be encumbered with, and as a matter of fact do not have, more than one equipment, we shall show that the practical effect of the restrictive provision above quoted is an absolute restriction of this great class of dealers to the sale of the products of the leasing corporation.

The oil companies differ respecting the fairness or desirability of the practice.

At the outset it may be well to state that the oil companies, great and small, are divided in opinion respecting the fairness or desirability of the leasing practice with restrictive covenant.

Respondent, Maloney Oil & Mfg. Company, is among those who condemn the practice, having stated in its answer that the company "is now and always has been opposed to furnishing dealers or users the tanks and pumps, and has only done so in a few cases to meet competition, and if it is within your power and that (sic) you will enjoin *all concerns* from continuing the practice, we shall be glad to observe the order in letter and spirit." In passing, it may be said that similar disapproval of the practice was expressed by some of the five independent oil companies of Ohio, who petitioned for review of the Commission's order with regard to the present practice.

The Standard Oil Company of Indiana, the largest of the Standard Oil companies, doing business in the States of Indiana, Illinois, Michigan, Wisconsin, Missouri, Iowa, Minnesota, North Dakota, South Dakota, and Kansas, through its general manager of sales, gave testimony that his company had adopted exclusive leasing "in self-defense" to meet the practice as employed by competitors, and after full investigation had found "that the practice has been and is contrary to the judgment of

the sales managers of respondent and is in their judgment bad merchandising." (Sinclair Rec., p. 107.) This company abandoned the practice under order of the Federal Trade Commission. (Sinclair Rec., p. 106.)

The Atlantic Refining Company, one of the most powerful of the Standard Oil group, doing business in the States of Pennsylvania and Delaware, employs the exclusive leasing system to the least extent practicable, in view of the use of the practice by their competitors. They prefer to sell the dealers the equipment (Standard Rec., Vol. II, pp. 584, 588), and do sell it four times out of five (Standard Rec., Vol. II, pp. 560, 590), and would sell the fifth but that the dealer knows he can secure an equipment gratuitously from a competitor. (Standard Rec., Vol. II, p. 560.)

Since as shown elsewhere in this brief (post p. 20) the system is employed very little, if at all, between the Mississippi River and the Rockies, it is clear that great Standard Oil concerns occupying the western parts of the country, such as the Standard Oil of Nebraska, the Standard Oil of Louisiana, the Standard Oil of Kentucky, the Magnolia Petroleum Company, the Continental Oil Company, and the Standard Oil of California, as well as independents, do not engage much, if at all, in the exclusive leasing practice.

The general manager of the National Refining Company, one of the largest independents (Standard Rec., Vol. III, p. 297), doing business in fifteen

States in the middle west (Id., Vol. III, pp. 289, 290; Sinclair Rec., p. 90), declared that his company does not practice the leasing of equipment (Sinclair Rec., p. 92) and that the practice is "an undesirable practice and mighty poor merchandising." (Standard Rec., Vol. III, p. 292.)

The Indian Refining Company, a large independent, doing business in practically all of the States of the United States east of the Mississippi (Vol. II, p. 8), highly disapproved the practice as "buying a man's business." (Standard Rec., Vol. II, p. 15.)

It is evident that many, if not the majority, of the great companies of both the Standard Oil and the independent groups are in dissent as to the practice, and such fact tends inevitably to the conclusion that the great benefits to the public set up by respondents herein (see our argument, post pp. 52-65) are inherent, not in the leasing of modern equipment with exclusive covenant but in the employment of modern equipment irrespective of its ownership.

The small companies, in so far as their testimony has been secured in this proceeding, are still more generally opposed to the practice.

I.

THE FACTS.

1. Introductory.

Gasoline and other petroleum products are sold at wholesale by two classes of companies, (1) refining companies which produce crude and/or purchase it from producers and refine it, and (2) wholesale concerns which purchase refined products from refining companies. Both classes of companies market gasoline to three classes of customers: First, direct to the consuming public through what are commonly called "filling stations" or "service stations"—large depots for the sale of gasoline, lubricants, or other petroleum products; second, to public garages which sell gasoline and lubricants as a part of their business; finally, both refiners and wholesale dealers sell gasoline to retail dealers, proprietors of "curb stations," who sell it to the operators of motor vehicles. This last class of customers constitutes the principal market of all concerns selling gasoline at wholesale.

The instant cases are not concerned with sales direct by refiners or wholesalers to consumers through filling or service stations. The cases do involve to some extent leases of the equipment of the character hereinafter described to public garage owners; but they deal primarily with competition for the business of the small retailers—the many thousands of proprietors of "curb pump stations."

Gasoline, kerosene, and kindred products were for many years shipped by rail or water from the

refiner and wholesaler to retail dealers in wooden barrels, steel barrels, or drums, in which the dealers usually retained such products until sold, when the containers were returned to the seller. With the enormous increase in consumption of gasoline, particularly in the last fifteen years, due to increase in population and to the use of motor vehicles, it has come to pass that the methods of distribution by the refiner and wholesaler, as well as the method of storage and sale by the retailer, have changed. The wholesaler, whether refiner or wholesale dealer only, delivers his product to the retailer in large part by tank wagons, very largely motor-driven. The retailer has substituted for the barrel and drum as a storage container an underground tank of from 250 gallons to 1,000 gallons capacity with a pump attached, which measures the gas as it is thereby forced from the storage tank into the customer's motor. These devices for storing and measuring gasoline were originated and placed on the market by manufacturers of equipment of this character, of which there are a number, some of them corporations with large business and substantial capital. Such devices had been sold in large numbers to retailers of gasoline and were in very general use before the practice here complained of was adopted by the respondent companies, or by other oil companies.

Within very recent years, principally the five years last preceding the institution by the Commission of proceedings in these cases, certain of

the gasoline companies, both refiners and wholesale dealers, selling gasoline at wholesale, conspicuously the great refining companies, have engaged in the practice heretofore outlined of leasing to the individual retailer, for a nominal consideration, a tank and pump outfit for the storage and measuring of gasoline, upon the agreement expressed in the lease that such outfit shall be used only for the storage and sale of gasoline purchased from the lessor. These leases have been entered into both with existing dealers and with persons just entering the business. The proportion of established dealers placed under such lease does not appear from the record, but it is fairly clear that thousands of both established and new dealers have been tied up.

2. Number of leases outstanding in the names of respondents.

The respondent, Standard Oil Company of New Jersey, at the time the testimony was taken, had outstanding 5,500 such leases in the territory in which it sells, comprising the States of New Jersey, Maryland, Virginia, West Virginia, and North and South Carolina. (Standard Rec., Vol. II, p. 199.) The investment in this installation amounted to $1,300,000 (id., p. 493), or an average of approximately $236.36 for each leased equipment. The exact number of retail dealers in gasoline doing business in the territory of the Standard Oil Company of New Jersey is not given in the record, but a fair approximation of the number may be arrived at. The general manager of the Atlantic Refining Com-

pany, that member of the Old Standard Oil combination which does business in the States of Pennsylvania and Delaware, testified that 10,000 "is pretty nearly the total of all distributors of gasoline in the States of Pennsylvania and Delaware. (Standard Rec., Vol. II, p. 550.) Conceding that the number of retail dealers in proportion to population is the same in the six States in which the Standard Oil Company of New Jersey does business, there would be approximately 12,700 dealers in those States.[2] This estimate may not be correct, but if not the error is by way of overestimate, since there are probably more retail dealers in gasoline per thousand of population in Delaware and Pennsylvania than in the States of New Jersey, Maryland, Virginia, West Virginia, and North and South Carolina. It appears, therefore, that of approximately 12,700 retail dealers in these six States the respondent, Standard Oil Company of New Jersey, has leases of the character herein complained of with 5,500.

The number of leases outstanding in the name of the respondent, Maloney Oil & Manufacturing Company, is small; and the exact number of leases outstanding in the name of the respondent, Gulf Refining Company, is not proven, but the company's answer to the Commission's complaint admits the general adoption of the practice and its widespread employment by the company. (Gulf Rec., Vol. I, pp. 13, 14.)

[2] The Census shows the population of Pennsylvania to be 8,720,017 and of Delaware 223,003, or a total for the two States of 8,943,000, while the population of the six States in which the Standard Oil Company of New Jersey does business are as follows: New Jersey, 3,155,900; Maryland, 1,449,661; Virginia, 2,309,187; West Virginia, 1,463,701; North Carolina 2,559,123; South Carolina, 1,683,724; total, 12,621,296.

The Sinclair Company has outstanding 459 such leases scattered over 18 States. (Sinclair Rec., p. 138.) Since it is the method of competition involved in such leases which is on trial, it may be here noted that the Standard Oil Company of New York, which was one of the respondents in the proceedings before the Commission, has outstanding in New York and the New England States approximately 8,000 such leases. The Commission's order against this company was set aside by the Circuit Court of Appeals for the Second Circuit.

The extent to which the practice has been resorted to by particular companies is shown also by the percentage of their gasoline business done under leases containing the restrictive covenant. As early as 1916, 48.9 per cent of the entire gasoline trade of the Standard Oil Company of New York was with lessees of equipment, and with the restrictive covenant, and 68 per cent of the business with the automobile trade was done with such lessees. (Standard Rec., Vol. II, pp. 522, 545.) Of the trade of the Texas Company 60 to 65 per cent is with the same class of customers. (Standard Rec., Vol. II, pp. 459, 461.) The great bulk of the business of the Standard Oil Company of New Jersey is of the same kind. (Standard Rec., Vol. II, p. 498.)

The Standard Oil Company of New York has a practical monopoly throughout Vermont and New Hampshire (Standard Rec., Vol. II, pp. 111, 112, 113), and also clearly controls the market adjacent to New

York City. (Standard Rec., Vol. II, p. 245.) There is also recognition in the record of the arrival of the stage bordering on monopoly in that section. (Standard Rec., Vol. II, pp. 514, 515.)

3. All dealers in some communities under restrictive covenant.

Not only has the respondent, Standard Oil Company of New Jersey, a large percentage of the retail dealers in the territory served by it under these leases, but it also appears that in some communities approximately all of the retail dealers have been placed under such contracts, either by the respondents or by other companies. The manager of distribution of the Indian Refining Company, which markets in States east of the Mississippi River, estimates that in the large cities in his company's territory from 60 to 75 per cent of the retail dealers in gasoline have equipments installed under leases in which the restrictive covenant complained of is found, while in the outlying towns probably not to exceed 25 per cent of the retail dealers are under such leases. (Standard Rec., Vol. II, p. 49.) Another witness testified that 75 to 85 per cent of the outfits in his district were loaned under restrictive covenants (Standard Rec., Vol. II, p. 61); another wholesale marketer believed that the proportion of leases would amount to 80 or 90 per cent (Standard Rec., Vol. II, p. 436); still another testified that in his territory 50 per cent of the dealers were under such contracts. The effect has been

practically to exclude companies not making such leases from certain territory. (Standard Rec., Vol. II, p. 375.) A representative of the Indian Refining Company, one of the large independent wholesale distributors, testified:

> A. We could pick out some few centers where we could say that we practically do not to-day sell a single garage man where we did, at one time, have a nice business.
>
> Q. Was the decrease in your business there due to this practice?
>
> A. Oh, absolutely. I want to say right here, in speaking about volume of business, my statement that our business had increased, I do not mean that it had necessarily increased, in the places where this practice has been followed, but I mean that our total business had increased, despite this policy, which meant that when you lose it in one place you have got to get it in another. . . . I know of one town in North Carolina where, when we went in there, I would say ten years ago, we secured a fair volume of business, which has gradually dwindled down to where I think we to-day have practically nothing in the way of business with the garage men.
>
> Q. Do you know why?
>
> A. On account of the giving of these tanks (Standard Rec., Vol. II, pp. 52, 53.)

4. The individual retailer requires but one set of equipment.

The Commission's complaint in each of the instant cases charged, and the Commission found as a fact, that in the vast majority of instances the retail dealer has use for but one set of equipment for the storage and sale of gasoline. The Commission's finding on this point in each case is as follows:

> That a small number of retail dealers to whom the respondent leases or sells such devices upon the terms and conditions aforesaid handle similar products of respondent's competitors, but a large majority of the retailers to whom the respondent leases or sells such devices upon the terms and conditions aforesaid require and use in their business only a single pump outfit. (Findings, par. 5; Standard Rec., Vol. I, pp. 27–28; Maloney Rec., Vol. 1, pp. 26–27; Gulf Rec., Vol. I, pp. 26–27.)

The evidence in support of the Commission's findings on this point is overwhelming. (Standard Rec., Vol. II, pp. 179, 180, 184, 185, 113, 344, 358; Vol. III, pp. 42, 43, 290, 291.)

5. Leases prevent any competition for business of retail dealers.

The effect of the restrictive covenant in the leases is to prevent gasoline marketers other than the lessor from selling or even soliciting the business of the dealer. The following excerpts from the testimony amply support this:

A. It seems to me if the owner of each equipment would own the equipment, naturally I would have a chance at it, no matter who sells it to him, but, at one time or another, I could probably get around him and get some of his trade; but by being tied up to another company, of course, I stand no chance to sell him any except these equipments that I put out myself. (Standard Rec., Vol. II, p. 224.)

A. Well, there is another phase of that enters into it, and that is, they use the equipment, once they have it in, as an intimidation whereby to hold their trade. For instance, a garage man might be persuaded to install the Standard Oil equipment practically free and later on have a change of heart and want to come over to an independent, and the Standard Oil Company, by reason of their lease, could either rip his tank and pump out, at considerable inconvenience to the garage man, or the cost price of the equipment might be due the moment they put another company's gasoline in their tanks, and their accounts could be trusteed, I suppose, and cause the garage man considerable trouble. (Standard Rec., Vol. II, pp. 237–238.)

A. But if you can get in a new pump there it pleases him, and he will tie up with you and you will get his business. The old pump belonged to himself and everybody had a shot at his business, but the concern that goes in and puts in a new pump, nobody gets his business but they. (Standard Rec., Vol. II, pp. 334–335.)

Q. Have you ever tried to sell your product to a garage where there is a lease and loan installation?

A. Yes, sir; we have.

Q. Have you ever been successful along that line?

A. No, sir; not in any permanent way. Sometimes they would buy of us if they were neglected and out of gasoline from the parties that they had the contract with. (Standard Rec., Vol. II, p. 344.)

Q. And, in fact, is not the very purpose of these contracts to control the business of the company, the retailer, with whom you put in your leased equipment, to such an extent that if you did not think you could control his business by placing such an equipment under such a contract you would not place the equipment at all?

A. Yes. (Standard Rec., Vol. II, p. 367.)

Q. Why don't you think it is a good business practice, Mr. Talbot, to furnish the pump for the purpose of getting a customer for your gas?

A. I don't think it is either good for ourselves or anyone else. It is monopolizing that particular customer. (Standard Rec., Vol. III, p. 18.) I think if no other oil company loaned pumps and we did loan it we would get more business if we did loan them.

Q. Then in that case that advantage would come from the monopoly you would derive?

A. Yes.

Q. So that one of the reasons for leasing and loaning these pumps is that you thereby monopolize the business of your customer?

A. Sure; that is one of the reasons. (Standard Rec., Vol. III, p. 65.)

Q. So you do it (i. e., loan equipment) because in that way you are enabled to get a corner on your customers and hold your gallonage up?

A. We feel it is fair to him to do that.

Q. No; you do not answer my question.

A. I do not know that I got your question. (Question read.)

A. We do it to hold our gallonage up.

Q. And if you could not retain your customer by entering into these tying arrangements with him so that he is compelled to buy from you, you feel that you should lose your gallonage?

A. We would have to take other means to get the gallonage.

Q. If you will just answer my questions——

A. Well, yes. (Standard Rec., Vol. III, pp. 101–102.)

The dealer's purchases are effectively controlled by the lessor while the lease is in force, and as thousands of such leases are outstanding in the name of the respondent companies the business of thousands of such dealers is monopolized.

6. The covenant restricts also competition in kerosene and lubricating oils.

While the covenant in the contract restricting the dealer to the lessor's goods is in terms limited to gasoline, its practical effect is to carry with it also the business in lubricating and illuminating oils. (Standard Rec., Vol. II, pp. 322–323, 106, 111, 112, 172, 261, 298–299, 325, 345.) The business in lubricants affords a far larger margin of profit than the gasoline business and is very valuable in itself.

7. The practice of leasing with restricting covenant confined largely to the eastern portion of the United States.

The leasing of tank and pump outfits, with the covenants for exclusive use, is a practice which has not been developed to any extent in the great territory lying between the Mississippi River and the Rocky Mountains. (Standard Rec., Vol. II, pp. 454, 462; Vol. III, p. 241.) Equipment of this character is very largely in use, but not leased for a nominal consideration and with covenant restricting its use to the sale of gasoline purchased from the lessor.

8. Effect of the practice on manufacturers of equipment.

There are a number of companies whose business consists in the manufacture and sale in interstate commerce of equipment of the character leased by respondents upon nominal consideration. These equipment companies originally created the demand

among retail dealers for equipment of this character, and they were selling large quantities of it before the practice of leasing or loaning it was instituted by oil companies. The effect of the use of this practice by the oil companies has been greatly to injure the business of the companies engaged in the manufacture and sale of equipment. In some territories where the leasing and loaning practice has been vigorously pushed by the oil companies the equipment companies have been practically driven from the business. (Standard Rec., Vol. II, p. 154; id., p. 243; Vol. II, pp. 111, 124, 129, 142, 143, 145, 148, 315.) Obviously no equipment companies selling these tank and pump outfits can compete with the oil companies leasing or loaning them practically without consideration. In so far as the oil companies purchase this equipment direct from the manufacturers the practice may have little effect upon their business, since it is immaterial to a manufacturer of equipment whether he sells to the retailer or to the refiner or wholesaler of gasoline. But where, as in the case of respondent Standard Oil Company of New Jersey, the leasing company also manufactures, through a company which it controls by stock ownership or otherwise, the equipment which it leases, manifestly the equipment companies can not sell equipment to the retail dealers in competition with the oil-refining companies loaning or leasing it without consideration.

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II.

ERRORS RELIED ON.

The Circuit Court of Appeals for the Third Circuit erred—

1. In holding that enhancement of the prices of gasoline as a result of the practice complained of must be proven before the practice may be held to injure the public;

2. In holding that the practice complained of has decreased the cost of distributing gasoline;

3. In holding that the practice is necessary to insure the public getting the precise make of gasoline advertised on the pump globe;

4. In holding that if the Commission's order be sustained the inevitable result will be to reduce the number of curb pump stations;

5. In holding that in determining whether given acts amount to unfair methods of competition because of their dangerous tendency unduly to hinder competition or create monopoly, or whether the acts substantially lessen competition or tend to create monopoly within the meaning of section 3 of the Clayton Act, the standard of legality to be applied is that established by the Sherman Antitrust Act in the words "restraint of trade or commerce" and "monopolize or attempt to monopolize";

6. In holding that leasing a curb pump outfit at a nominal rental is not oppressive to competitors, and therefor not an unfair method of competition;

7. In holding that when a wholesale distributor of gasoline leases a curb pump outfit to a retailer it leaves competitors free to install competing outfits (*a*) in the same locality and (*b*) with the same retailer;

8. In holding that the practical effect of the restrictive covenant in the leases is not to prevent the use by the retailer of the equipment of a competitor of the lessor, nor to prevent the retail dealer from purchasing gasoline from competitors of the lessor;

9. In not holding that the effect of the leases with the restrictive covenant is to substantially lessen competition and to tend to create monopoly in the sale of gasoline and other petroleum products *at wholesale* and in the sale of pump outfits;

10. In holding that the restrictive covenant leaves the retail dealer free to deal in all petroleum products of competitors of the refiner or wholesaler making the lease;

11. In holding that because the lease may be terminated by the retailer on brief notice, the effect thereof is not to substantially lessen competition or tend to create monopoly;

The Circuit Court of Appeals for the Seventh Circuit erred—

1. In holding that the practice may not be held to be an unfair method of competition unless it amounts to a fraud upon some public or private right;

2. In not holding that methods of competition which have a dangerous tendency unduly to hinder competition are unfair within the meaning of the statute, though the element of fraud be entirely absent;

3. In holding that the leasing of tank and pump equipment at a nominal rental is not an unfair method of competition as against manufacturers of this equipment;

4. In holding that the equipment is not leased upon the condition that the dealer shall not sell the products of a competitor of the lessor, though the Commission found that only a small proportion of dealers require or use more than one such equipment;

5. In holding that the Commission's order fixed or regulated the rentals of equipment;

6. In failing to distinguish between the leasing of equipment upon a nominal consideration for the purpose and with the effect of suppressing competition in the sale of gasoline, and the usual and ordinary case of a lease of real or personal property with limitations upon the use of the property which do not accomplish an unlawful end;

7. In holding that some 430 retail dealers, parties to the leases, were necessary parties respondent to the Commission's complaint.

III.

THE LAW ON THE MERITS.

The violation of the Clayton Act.

Section 3 of the Clayton Act is as follows:

> SEC. 3. That it shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies or other commodities, whether patented or unpatented, for use, consumption or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

An analysis of this section reveals that it prohibits (1) leases and sales, or contracts for sale, (2) the fixing of a price, (3) the making of a rebate from the price, (4) the making of a discount from the price, on the condition, agreement, or understanding that the lessee or purchaser shall not use or deal in the goods, etc., of a competitior or competitors, where the effect may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

In the instant case, therefore, three points must be established in order to show a violation of this section: (1) That the respondents have made leases, (2) upon the condition that the lessee shall not deal in the goods of a competitor or competitors, and (3) that the effect of such leases may be to substantially lessen competition or tend to create a monopoly.

1. RESPONDENTS' OUTFITS ARE LEASED.

Respondents have not thus far in these cases contended that their outfits are not "leased" within the meaning of the statute. Thus the presence of one element in establishing a violation of the act need not be discussed.

2. RESPONDENTS' LEASES ARE UPON THE CONDITION THAT THE DEALERS SHALL NOT DEAL IN GASOLINE OF COMPETING REFINERS OR WHOLESALERS.

Respondents contend, and the courts below held, that the condition in respondents' leases that the leased equipment shall not be used for the storage and sale of gasoline purchased from others than the lessor is not a condition that the lessee shall not deal in the products of a competitor or competitors.

On the other hand, petitioner contends that under the practical construction and application which should be given to the statute the covenant, read in the light of the facts under which it is made, does provide that the dealer shall not deal in the gasoline of competitors of the lessor.

The Commission's complaints alleged, and the Commission found, "that only a small proportion of such lessees . . . require or use more than a single pump outfit in the conduct of their business." This being true, every lease entered into by respondents with dealers who require but one outfit in their business is one by which the lessee agrees not to handle the gasoline of competitors of the lessor. If the dealer has no business need or use for an additional outfit, he will necessarily not install it, and the result is that he can, under his contract, deal only in the gasoline of the lessor. Where these facts are known to both parties, there is certainly an "understanding," within the meaning of the statute, that the lessor will not deal in the gasoline of others during the existence of the lease.

In *Standard Fashion Co.* v. *Magrane-Houston Co.* (decided by this court on April 10, 1922), the contracts of the Fashion Company provided that the dealer should "not sell or permit to be sold on its premises" any other make of pattern; and it was contended by the pattern company that this condition did not violate the statute, since it did not provide that the dealer should not handle the patterns of competitors, but this court held the contrary, saying:

> It is idle to say that the covenant was limited to the premises of the purchaser, and that sales might be made by it elsewhere. The contract should have a reasonable construction. The purchaser kept a retail store

> in Boston. It was not contemplated that it would make sales elsewhere. The covenant, read in the light of the circumstances in which it was made, is one by which the purchaser agreed not to sell any other make of patterns while the contract was in force.

Again, in *U. S.* v. *United Shoe Machinery Co.* (decided by this court April 17, 1922), where the lease of the United Machinery Company did not contain an express provision that the lessee should not use machines of competitors, this court said:

> While the clauses enjoined do not contain specific agreements not to use the machinery of a competitor of the lessor, the practical effect of these drastic provisions is to prevent such use. We can entertain no doubt that such provisions as were enjoined are embraced in the broad terms of the Clayton Act, which cover all conditions, agreements, or understandings of this nature.

On this point Judge Morris, in his dissenting opinion in the instant cases decided by the Circuit Court of Appeals for the Third Circuit, says in part:

> With respect to the one-pump retailer the restrictive clause in the lease in question is as effective in preventing the lessee from using or dealing in the gasoline of a competitor of the lessor as if the lease expressly so provided. . . . It is likewise true that the lessee has the right to install another pump of his own or a pump of a competitor; but, as his business does not warrant or require more than one pump, he has not installed more than one, and, consequently, his right

> is not a practical one, but a mere abstract right. The result, in my opinion, is that in practice the restrictive clause of the leases in question has prevented and prevents a "single pump" lessee from using or dealing in gasoline of a competitor of the lessor just as effectively as if the lease had expressly so provided.

This reasoning is sound. In the development of the gasoline business it has come to pass that the underground tank of the retail merchant is his store. It is to the retail dealer in gasoline what shelves, counters, and showcases are to the retail dealer in tobacco, drugs, or general merchandise. If one such storage tank is sufficient to supply the retail dealer's trade, he will no more install a second than will the dealer in general merchandise build another store if his existing structure will amply serve his trade, though he have acres of vacant land. The leases in the instant case effectively exclude competition for the business of the only store which the dealer has or needs, and by so doing in fact provide that the lessee shall not deal in the goods of competitors.

3. MAY THE EFFECT OF THE LEASES BE SUBSTANTIALLY TO LESSEN COMPETITION.

The third and last element necessary to establish a violation of section 3 of the Clayton Act is that the effect of the leases "may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

(a) *Meaning of the term "substantially lessen competition."*

This court has not thus far defined the terms "substantially lessen competition," nor have sufficient cases been decided under the statute to forecast its probable ultimate interpretation.

Light may be had on this point from a consideration of the state of the law at the time the legislation was enacted, the history of the times, and the mischief sought to be remedied.

For a number of years prior to the passage of the Clayton Act the opinion of legislators, administrative officers, and the public appears to have been crystallizing against the use of contracts requiring exclusive dealing, the payment of deferred rebates and allowance of discounts in consideration of such dealing, and the use of contracts or conditions attached to the sale or lease of patented articles requiring that supplies, etc., should be purchased from the lessor or seller.[3]

In many cases prior to the passage of the Clayton Act the contention had been made both by prosecuting officers of the Government and by counsel for private litigants that arrangements of this character, where evidenced by contracts, violated the Sherman Law because of their effect to restrain trade within the meaning of section 1 of the act, or because they constituted an attempt to monopolize within the

[3] For the prevalence of such arrangements and their effect upon competition see "Unfair Competition," by W. H. S. Stevens, University of Chicago Press, 1917, pp. 54-92.

meaning of the second section. The Federal courts, with one or two exceptions, had held, however, that such contracts and offers of rebates and discounts did not violate the act.[4] These decisions cover the period from 1892 to 1914, the year in which the Clayton Act was passed.

During the latter part of this period, the States of Massachusetts, Michigan, North Carolina, and Kansas enacted laws absolutely prohibiting contracts for exclusive dealing, and in some instances the payment of rebates and discounts in consideration of such dealing, without regard to their effect upon competition.[5] In other words, the legislatures of these States determined that such contracts or agreements were so dangerous to the public welfare that they prohibited their use under any circumstances.

These persistent efforts on the part of administrative officers and State legislatures doubtless impressed Congress with the desirability of prohibiting these contracts by special enactment, which was

[4] The following cases held such contracts and offers did not constitute violations of the Sherman law: *Wilder* v. *Corn Products Refining Co.*, 236 U. S. 165, 172–173; *in re Greene*, 52 Fed. 104, 117–118; *Olmstead* v. *Distilling Company*, 77 Fed. 265; *in re Corning*, 51 Fed. 205; *in re Terrell*, 51 Fed. 213; *U. S.* v. *Prince Line*, 220 Fed. 230, 233; *Whitwell* v. *Continental Tobacco Co.*, 125 Fed. 454, 461, 463. Cases holding contracts requiring exclusive dealing to be unlawful are: *United States* v. *Great Lakes Towing Co.*, 208 Fed. 733, 738, 744 (1913), s. c. 217 Fed. 656, 659, 660 (1914); *United States* v. *Keystone Watch Case Co.*, 218 Fed. 502 (1915). It will be seen that one of the two decisions condemning such arrangement was handed down in the same year in which the Clayton Act was passed and another in the succeeding year.

[5] Mass. Revised laws, chap. 56, sec. 1; Mass. Laws 1907, chap. 469; Mich. P. A. 1905, No. 229, sec. 2; N. C. laws 1913, chap. 41, sec. 5b; Kansas Gen. Stats. 1909, sec. 1649. For a decision construing the Massachusetts statute, see *Commonwealth* v. *Strauss*, 191 Mass. 545.

done in section 3 of the Clayton Act. But inasmuch as these practices had been repeatedly held not to restrain trade or to amount to an attempt to monopolize, Congress, unless it desired to follow the example of the States and prohibit them absolutely, was compelled to adopt other language than that of the Sherman law,—to establish a new and different standard of legality. It did this by the use of the words "if the effect may be to substantially lessen competition or tend to create monopoly."

Concerning this, this court has said:

> The Clayton Act sought to reach the agreements embraced within its sphere in their incipiency, and in the section under consideration to determine their legality by specific tests of its own. (*Standard Fashion Co.* v. *Magrane-Houston Co.*, decided by this court on April 10, 1922.)

While thus holding that the Clayton Act established a new standard of legality by which the practices embraced in section 3 are to be judged, the court does not discuss at length the interpretation to be given to the section.

It is submitted that the proper interpretation to be given the words "substantially lessen competition" is to be reached by a consideration of the nature of the practice used and the manner in which it may lessen competition. To illustrate, a combination, by way of holding company, between practically all of the companies engaged in interstate commerce in a given line within a substantial ter-

ritory, would lessen competition by eliminating practically all competition from that field, and might amount to a restraint of trade prohibited by the Sherman law. An agreement between the principal companies engaged in interstate commerce in a given territory, fixing the prices at which they would sell their products, would lessen competition by eliminating price competition in a particular line. Such illustrations might be multiplied.

Similarly sales, contracts for sales, rebates or special discounts, in consideration of exclusive dealing, lessen competition by closing the avenues of trade to all competitors to the extent to which such contracts or arrangements are made and for the period covered by such contracts or arrangements. The quality or character of the restraint imposed by such contracts is always the same. It is merely that of exclusion. In the language of the District Court of the United States in *United States* v. *United Shoe Machinery Company*, 264 Fed. 138, 168—

> This places it in the power of the lessor to substantially lessen competition in these lines of trade, and therefore is obnoxious to the statute. As said in *Patterson* v. *United States* (222 Fed. 599, 620, 138 C. C. A. 123, 144), "But, though but one competitor can make a sale, all competitors can enjoy the free opportunity of approaching each and every prospective purchaser on equal terms, with the chance of making a sale, if he can persuade him to buy. For one competitor to exclude all, or substantially all, other competitors from such

> opportunity—i. e., drive them from the field of freely offering their goods so as to have that field to himself—is to monopolize, according to the legal and accurate sense of the word."

Obviously if a single manufacturer or wholesaler could make such contracts with all retailers in a particular line he could have a complete monopoly during the life of the contracts, except so far as new dealers might enter the business, and even these he might induce to make such contracts. Thus would competition be completely eliminated.

If this construction be correct, then the principal factors to be considered in a particular case are the size of the organization making the leases or contracts, the territory covered, the number of dealers in a particular line, the number under exclusive contract with the lessor or selling company, and the size and importance of such retail dealers. If competitive access to the market is closed to a substantial degree competition is substantially lessened.

(*b*) *No question of intent involved in Clayton Act.*

If the effect of the leases with the exclusive covenant is substantially to lessen competition, the intent with which such leases are made is of no consequence. A company might institute a policy of entering into such leases with the express intention of lessening competition or monopolizing, but if the number of contracts which it succeeded in securing was not sufficient to accomplish the desired purpose, there would be no violation of the Clayton Act. On

the other hand, if such contracts were entered into in such number and under such conditions that the effect was to substantially lessen competition, the purpose of the lessor, however innocent, would not avail to take the contracts out of the operation of the statute. Even under the Sherman law this court has consistently held that if the result of contracts or combinations is materially to restrain trade, the intent with which the thing is done is of no consequence (*U. S.* v. *Reading Co.*, 226 U. S. 324, 370; *Standard Oil Co.* v. *U. S.*, 221 U. S. 1, 75), and specific intent need not be alleged even in a criminal indictment. (*U. S.* v. *Patten*, 226 U. S. 525.)

(c) *The leases in the instant cases substantially lessen competition.*

In the instant cases the Standard Oil Company of New Jersey had approximately 42 per cent of the dealers in the large interstate territory in which it does business under leases by the terms of which the lessee dealers bind themselves not to sell through the equipment so leased gasoline purchased from others than the lessor. We have heretofore pointed out that since one equipment is all the dealer can use, such contracts are, in fact, exclusive (ante, pp. 16,26–29. Thus a large proportion of the market in that territory can not be successfully solicited by competitors of the Standard Oil Company of New Jersey during the continuation of the leases. Indeed, if the leases be legal, a court of equity will enjoin competitors of

the company from inducing dealers to purchase gasoline for sale through this equipment. When seeking to ascertain competitive conditions in this territory, similar leases existing between other wholesale marketers and retail dealers must be taken into consideration and the narrowing of the market to that extent increased. In some districts practically all dealers are under contract either with the Standard Oil Company of New Jersey or with other wholesale marketers, thus practically closing those districts to all outside competition in so far as the business of existing dealers is concerned.

The Standard Oil Company of New Jersey has invested in equipment leased with the restrictive covenant approximately $1,300,000, on which it receives in the form of direct returns only a nominal sum. If the leases be upheld, probably all of this equipment will remain with dealers until it is worn out, without other than nominal direct return to the company. This investment is therefore a fair measure of the value to the company of the restrictive covenant in the leases.

The Gulf and Maloney companies have a substantial number of leases outstanding in the same and other territories. Every such lease still further closes the avenues of competition.

While the leases of the Standard Oil Company of New York are not directly before the court in these cases, it was stipulated that the evidence, as respects the effect of the practice, should be applicable

against all companies, and it is proper therefore to refer to the fact that the Standard Oil Company of New York has approximately eight thousand dealers in New York and New England under similar leases. The effect of the exclusive covenant to lessen competition in these fields is apparent. On this point Judge Morris, in his dissenting opinion in the Circuit Court of Appeals for the Third Circuit, says:

> Whether its effect may be to substantially lessen competition or tend to create a monopoly is our second question for consideration. The leases are now in force. The fact that they may be terminated at some future time is not relevant to the issue now under consideration. What has already been said shows that "a large majority of the retailers" require for use in their business only a single pump outfit, and the practical effect of the restrictive covenant of the lease under which they operate is to prevent such large majority from using or dealing in the gasoline of competitors of their respective lessors. Thereby free competition among the wholesalers of gasoline has been and now is restricted, not with respect to an insignificant number of retailers, but with respect to a large majority thereof, and as effectually as if the leases were in perpetuity and as if they expressly prohibited the lessee from using or dealing in the gasoline of competitors of the respective lessors.

Where leases of this character have been entered into with established dealers theretofore using their own equipment, the effect has been to close those

theretofore existing outlets to all competition. In the language of the Circuit Court, in *U. S.* v. *Keystone Watch Case Company* (218 Fed. 502):

> * * * it should be observed that they were already established customers, not only of the defendant company but also of its competitors, and had already become trade outlets for every manufacturer of goods whose wares they had been accustomed to buy. Now, what the defendant did was either to close those already existing and already utilized outlets, or to narrow them materially so far as the goods, if its competitors were concerned; and we think the proposition need not be discussed that this was pro tanto a direct and unlawful restraint of trade.

Where new stations have been established by the lease of equipment on nominal consideration, competition between wholesalers and refiners has not been increased, since the dealer's business was monopolized by the lessor company at its initiatory stage. Doubtless in most such instances if equipment had not been loaned dealers would nevertheless have entered the business and competition for their trade would have existed. (Post, pp. 53–57.)

The lessening of competition is augmented by the necessity for most wholesale marketers to adopt the practice if competitors in their territory institute it. The record shows that a number of companies adopted the practice in order to hold any trade at all. Even the great Standard Oil Company of Indiana adopted the practice in self-defense. (Sinclair Rec., p. 135.)

The small people in the trade were feeling the necessity to a greater extent. (Sinclair Rec., pp. 137, 138, 167.) Competitors were making so many leases with restrictive covenant respecting the use of the equipment that companies not adopting them were being threatened with exclusion from the trade.

Moreover, the contention of respondents, urged below, that some small companies may, by leasing equipment on nominal consideration establish outlets for their product, begs the question of the effect of the leases on competition for the business of existing dealers. Certainly the law was intended to preserve competition in existing commerce, as well as in commerce which may come into being in the future.

(*d*) *The words "may be" authorize the court to estimate future results.*

Indeed the words "may be" in the statute have the contrary effect, and empower the Commission and the courts to look into the future, in the light of existing conditions and facts, and to stop the use of exclusive and tying contracts where there is a probability that they will have the prohibited effect. Considering the large number of contracts now outstanding, the fact that the companies are increasing this number as rapidly as they can induce dealers to enter into additional leases, and realizing that in the near future the dealer distribution must approximate consumptive demand, can there be any question that leases of this character will practically close the

market to competitive effort when equilibrium between consumptive demand and dealer distribution shall have been restored?

4. THE TENDENCY TOWARD MONOPOLY.

Section 3 of the Clayton Act provides also that leases or sales upon the covenant or condition of exclusive dealing should be unlawful if the effect may be to tend to create monopoly in any line of commerce. A tendency is an inference to be drawn from proven facts. The proof in the instant case is to the effect that great companies have now under the exclusive contract from 40 to 60 per cent of the dealers in substantial territories and that companies other than the lessor can not sell these dealers. Thus these companies already control a very large percentage of the interstate commerce in gasoline flowing into those territories. Some of these companies, conspicuously, of course, those who contested the Commission's order, desire to continue the practice, and if allowed to do so will seek to place additional dealers under these leases and by this means to increase their already high degree of control over interstate commerce in gasoline in the territories in which they operate.

It is not the fact that a particular company does a large percentage of the business in a given interstate territory which condemns it as monopolizing, but the fact that this percentage of the business is held by contracts which in terms exclude others from competing for it. In the language of the Circuit Court of Appeals for the Sixth Circuit:

> It is never to be lost sight of that actually doing business, no matter how large, is not monopolizing. It is excluding from the opportunity of doing business that is. (*Patterson* v. *U. S.*, 222 Fed. 599, 625.)

Can it not be said from these facts that there is now, in certain territories comprising substantial groups of States, a tendency toward monopoly of interstate commerce in gasoline in the hands of these companies? That tendency will be accelerated and increased with every set of equipment installed under the restrictive covenant. Ultimately some of the companies may have such contracts with all, or practically all, of the dealers in their territories, but when that stage of development has been reached there will be complete monopoly and the stage of substantially lessening competition and tendency toward monopoly will long since have been passed. Will this court arrest the movement while in its earlier stages but, we contend, within the prohibitions of the Clayton Act, or will it await the further development which will violate the Sherman Anti-trust Act?

5. EFFECT OF LEASES OF INDIVIDUAL COMPANY TO LESSEN COMPETITION NEED NOT BE NATION-WIDE.

That the operations of a given company cover a comparatively limited number of States and do not extend through the entire country will not take the contracts out of the operation of the statute, nor will

the fact that the competition suppressed is not relatively large. This has been the consistent holding even under the Sherman Antitrust Law. In *Montague & Co.* v. *Lowry* 193 U. S. 38, 45, a strictly local combination was under consideration and the restraint imposed by the agreement applied to but one per cent of the trade in San Francisco in unset tiles. And yet in that case this court said:

> The agreement, therefore, restrained trade, for it narrowed the market for the sale of tiles in California from the manufacturers and dealers therein in other States, so that they could only be sold to the members of the Association, and it enhanced prices to the nonmember as already stated. . . .
>
> Again, it is contended the sale of unset tile is so small in San Francisco as to be a negligible quantity; that it does not amount to 1% of the business of the dealers in tile in that city. The amount of trade in the commodity is not very material, but even though such dealing heretofore has been small it would probably largely increase when those who formerly purchased tiles from the mnaufacturers are shut out by reason of the association and their nonmembership therein from purchasing their tiles from those manufacturers and are compelled to purchase them from the San Francisco dealers.

Similarly, in *U. S.* v. *Union Pacific R. R. Co.*, 226 U. S. 61, 88, 89, this court says:

> It is urged that this competitive traffic was infinitesimal when compared with the gross

> amount of business transacted by both roads, and so small as only to amount to that incidental restraint of trade which ought not to be held to be within the law; but we think the testimony amply shows that, while these roads did a great deal of business for which they did not compete and that the competitive business was a comparatively small part of the sum total of all traffic, state and interstate, carried over them, nevertheless such competing traffic was large in volume, amounting to many millions of dollars. Before the transfer of the stock this traffic was the subject of active competition between these systems, but by reason of the power arising from such transfer it has since been placed under a common control. It was by no means a negligible part but a large and valuable part of interstate commerce which was thus directly affected.

In like manner it has been held that combinations restricting competition in certain territory violate the Sherman law, though the territory involved be but a relatively small portion of the United States. (*Addystone Pipe & Steel Co.* v. *U. S.*, 175 U. S. 211; *Eastern States Retail Lumber Dealers Association* v. *U. S.*, 234 U. S. 600.)

6. RIGHT OF THE DEALER TO TERMINATE THE LEASES ON SHORT NOTICE DOES NOT PREVENT THEM FROM LESSENING COMPETITION.

The fact that the dealer may terminate the leases on short notice does not materially lessen their effect

to eliminate competition. On this point Judge Morris in his dissenting opinion says:

> The leases are now in force. The fact that they may be terminated at some future time is not relevant to the issue now under consideration.

While the leases may be practically at the will of the parties, they are not at the will of others. (*Truax* v. *Raich*, 239 U. S. 33, 38.) Competitors may not induce their termination. Only differences between the wholesale marketing company and the retail dealer which would warrant the latter incurring the inconvenience, interruption to business, delay, and consequent loss attendant thereon will result in the termination of the agreement. Moreover, while there are so many hundreds of such leases in comparatively restricted territory an occasional termination would not materially lessen the restraint imposed thereby.

7. THE PRACTICE HAS NOT INCREASED COMPETITION.

Respondents urged below that the practice had increased competition by enabling some of the smaller companies to compete in certain territories, since they had by this method induced persons to go into the retail business and handle their products in territories where such wholesale marketing companies would not otherwise have been able to make any sales. But while there is evidence to this effect in the record, the conclusion that the result was to increase competition fails to take into account conditions in the gasoline industry at the time. We

refer to the fact that this was made possible by reason of the fact that during most, if not all, of the period covered by the evidence there was a phenomenal increase going on in the consumption of gasoline. During the five years last preceding the taking of testimony the consumption of gasoline increased from eightfold to tenfold. (Standard Rec., Vol. II, p. 549.) A rapid increase in the number of retail dealers during this same period was necessary to supply this enormously increasing demand. As a consequence, new companies or established companies entering new territory were able to induce some persons, by offer of free equipment, to enter the business of retailing gasoline. But this phenomenal increase in consumption of gasoline and automobile lubricants can not continue indefinitely, and when the retail dealers have reached a number necessary satisfactorily to supply the consuming demand the rapid increase in dealers will cease, conditions in the industry will become more or less static, and no longer will wholesale marketing companies be able to increase their sales by inducing persons to enter the retail business. Men do not enter upon a business when it is apparent that their territory is occupied by enough, or more than enough, dealers to take care of the trade. When this condition is reached, wholesale marketers will not be able to enter new territory at all or to secure new customers in old territory.

Furthermore, it does not follow that the mere entry of a new retail dealer increases competition, either between wholesale marketers or retailers, certainly not between the former. When the wholesale marketer induces a person to enter the retail business by loaning equipment with the exclusive covenant, he monopolizes the business of that dealer so far as sales to him are concerned. On this point Judge Morris in his dissent says:

> Again, the petitioners contend that by means of the leases in question the number of retailers has been substantially enlarged, and competition thereby increased rather than lessened. If it be a fact that by means of the leases the number of retailers has been increased, such increase can beyond question due to the nominal rental and not to the tying clause and the tying clause is none the less invalid, even though accompanied by other clauses that are valid. Furthermore, each increase obtained by the nominal rental was simultaneously monopolized by the tying clause and competition thereby lessened and not increased.

And the learned Judge might have added that additional competition among retailers did not necessarily follow from the establishment of a new dealer under the restrictive covenant. Retailers are enabled to compete in price largely by reason of price competition between those from whom they purchase. When the dealer is under covenant to pur-

chase exclusively from one wholesaler, even though the contract be terminable on short notice, he does not have the benefit of competition between wholesalers for his business. As long as the contract exists he must take his gasoline from the particular wholesaler and at whatever price the wholesaler makes. Being unable, therefore, to have competition in his purchases, competition in his sales is limited, not increased. Respondent's argument on this point fails to note, as elsewhere pointed out (Ante, pp. 37–38), the lessening of competition for the business of existing retail dealers.

8. FAILURE TO PROVE ENHANCEMENT OF PRICES DOES NOT RELIEVE FROM VIOLATION OF THE CLAYTON ACT.

The Circuit Court of Appeals for the Third Circuit holds that the public has not been injured by the restrictive covenant in the leases. Immediately thereafter the court states that it is not found that the practice has enhanced the price of gasoline. Whether prices have been reduced the court cannot say.

If enhancement of prices is the primary injury to the public which the court has in mind it is submitted that proof of such enhancement has never been necessary to establish a violation of the Sherman law, nor would proof of decreased prices take a combination or contract out of the operation of that statute. In *United States* v. *Trans-Missouri*

Freight Association, 166 U. S. 290, 323, this court said:

> In business or trading combinations they may even temporarily, or perhaps permanently reduce the price of the article traded in or manufactured, by reducing the expense inseparable from the running of many different companies for the same purpose. Trade or commerce under those circumstances may, nevertheless, be badly and unfortunately restrained by driving out of business small dealers and worthy men whose lives have been spent therein and who might be unable to readjust themselves to their altered surroundings. Mere reduction in the commodity dealt in might be dearly paid for by the ruin of such a class, and the absorption or control over one commodity by an all powerful combination of capital.

Again, in *United States* v. *Swift & Company* (122 Fed. 529, 534), the court said:

> Indeed, combination that leads directly to lower prices to the consumer may, within the doctrine of these cases even as against the consumer, be restraint of trade; and combination that leads directly to higher prices may, as against the producer, be restraint of trade. *The statute thus interpreted has no concern with prices, but looks solely to competition, and to the giving of competition full play by making illegal any effort at restriction upon competition.* Whatever combination has the direct and necessary effect of restricting competition is, within the meaning of the Sherman Act, as now interpreted, restraint of trade.

The Clayton Act contains no mention of public interest or public injury. In the words of Judge Morris, in the dissenting opinion in the Third Circuit:

> In proceeding under that Act [the Clayton Act], the public interest is as conclusively presumed as in a criminal proceeding and needs to be neither alleged or proved.

He might have added with equal accuracy that the public was conclusively presumed to be injured if the effect of the contracts prohibited by the statute may be to substantially lessen competition.

Furthermore, the factors which operate to enhance or depress the market price of gasoline are so numerous and the measure of the effect a particular factor upon prices so difficult to arrive at, that it would be practically impossible to produce positive proof that the contracts in question directly affect prices. We contend that the law assumes that if competition is materially restricted it will necessarily, in some measure, increase prices. Moreover, the Antitrust Acts, including the Clayton Act, while intended, broadly speaking, to preserve price competition, were also intended, in the language of this court in *Ramsay* v. *Associated Bill Posters* (decided by this court January 2, 1923), "to preserve equality of opportunity in the field of commerce."

In the instant case the evidence shows beyond dispute that the lending practice both restrains competition and tends toward monopoly for the reason that it destroys the freedom of solicitation

for business, which the oil distributor would otherwise have or, to employ the phrase used in *Montague* v. *Lowry*, supra, the practice "has narrowed the market," and removes the opportunity for competition, because it ties thousands of individual retailers to the oil distributing corporations making the loans.

The violation of section 5 of the Federal Trade Commission Act.

The Federal Trade Commission Act provides in section 5 that—

> Unfair methods of competition in commerce are hereby declared unlawful.

This is a comprehensive definition of every method of bringing about unfair competition. All methods, any method, every method, if it shall appear to be directed at the overthrow of free and fair competition, is condemned. The method, whatever it may be, is unlawful if its effect be the prescribed unfair competition.

Free and fair competition is the affirmative and positive principle upon which our industrial and, in turn, our social system is based. The competitive system is justified upon the postulate contained within it that as a result of the operation of free and fair competition there results to the unit the highest degree of reasonable return and to the public the best service at the lowest cost. And so the antitrust laws and kindred statutes place monopoly at the opposite pole from fair competition. But seeing the

necessity for prevention of monopoly, as well as its punishment, attempt at monopoly was also included in the Sherman Act. Looking still further into the field of prevention it appeared that the way from free and fair competition toward monopoly led through restraint of trade, which was also therefore prohibited by the Sherman law.

But experience proved that either because of the limited condemnation of methods by the Sherman Act or because that act did not go far enough into the field to protect free and fair competition in the initial stages of the departure from those principles, it was not effective, and Congress took two steps forward by the Trade Commission Act. It threw off all limitations as to methods and amplified its definition of the unlawful departure from free and fair competition. Monopoly and restraint of trade are still under the ban, but the scope of preventative measures has now been advanced in the anticipatory field to check the movement from free and fair competition at the stage of unfair competition.

This court recognized this in the decision of *Federal Trade Commission* v. *Gratz*, 253 U. S. 421, where it said:

> The words unfair methods of competition are clearly inapplicable to practices never heretofore regarded as opposed to good morals because characterized by deception, bad faith, fraud, or oppression or as against public policy because of that dangerous tendency unduly to hinder competition or create monopoly.

This declaration was reaffirmed in *Federal Trade Commission* v. *Beech-Nut Packing Co.*, 42 Sup. Ct. Rep. 150, where the court said:

> If the Beech-Nut system of merchandising is against public policy because of "its dangerous tendency unduly to hinder competition or to create monopoly" it was within the power of the Commission to make an order forbidding its continuance.

The manner in which the practice condemned by the Commission in its orders in these cases substantially lessens competition or tends toward monopoly has already been discussed (ante pp. 35–39, 40–41). By the same reasoning the practice has not only a dangerous tendency unduly to hinder competition but in a large measure eliminates competition. Where he who seeks to sell gasoline in a large interstate territory finds as he goes about that from six to eight in every ten retailers approached are under contracts which in effect bind them to purchase from others, has not a practically complete barrier to competition been erected and trade effectively monopolized?

IV.

ALLEGED ADVANTAGES OF THE PRACTICE URGED IN JUSTIFICATION.

The respondents urged in the courts below a number of alleged advantages, both to themselves and to the public, resulting from the use of the practice which it was claimed fully justified its continued use. These alleged advantages will be discussed separately. Before entering upon their consideration in detail,

however, we desire to point out, first, that practically every advantage urged in favor of the practice in fact inheres in the pump and tank as an institution *not in the use of the restrictive covenant*, and, second, if the effect of the restrictive covenant is to substantially lessen competition or tend to create monopoly, no supposed advantage can justify its use as matter of law. Congress definitely determined the public policy when the law was enacted, and if it erred in declaring that no advantage in the use of the prohibited practice would compensate for the substantial lessening of competition resulting therefrom it must itself correct the error.

1. The loaning practice with restrictive covenant not essential to adequate equipment installation.

Respondents have urged below that the practice of loaning equipment with restrictive covenant is necessary if the public is to be adequately served with gasoline, and the court below held that if the practice were discontinued the inevitable result would be to reduce the number of curb-pump stations. We contend that this is refuted by the record. Richard D. Leonard, general manager of domestic sales of the Great Atlantic Refining Company, one of the subsidiaries of the old Standard Oil combination, testified in the most emphatic terms that his company sold four out of five sets of the equipment which it put out and could sell the fifth if its competitors were not giving them away. (Standard Rec., Vol. II, pp. 560–590.) This company prefers to sell equipment rather than lend it. (Standard Rec., Vol. II, p. 584–588.)

The following is quoted from Mr. Leonard's testimony:

> Q. Do you find in your experience that you find a good location for the establishment and installation of a curb-pump equipment where the owner or lessee of the location is unwilling to make the investment in an equipment or has not the capital to do so?
>
> A. I would say the general average is that a man has to have some period of time over which to pay for his material, pay for his installation. The problem of selling it to him is relatively simple. (Stand. Rec., Vol. II, p. 560.)

The manager of tank stations of the Crew-Levick Company, having charge over parts of five States, testified:

> Q. Have you not found out in your experience with the Crew-Levick Co. that it is not possible in many cases to persuade a person who has a proper location to buy a pump or pump equipment?
>
> A. I do not say so.
>
> Q. Well, what has been your experience?
>
> A. The man that has got a good location you can undoubtedly go to him and sell him a pump. It is not necessary to give him one . . .
>
> Q. . . . My question to you is this: Whether in your experience you have found persons owning or occupying desirable locations along the road through Pennsylvania who, notwithstanding they have desirable locations, either have not the money or are unwilling to invest

it in the pump equipment with a view to furnishing oil and gasoline products to the public?

A. I have not found any such cases as that. I do not believe that there is a case where a man owns a piece of property and where he has good traffic advantages where you can not go to him and show him that with a certain investment he will get a return of ten, or fifteen, or twenty, or twenty-five per cent a month, that you can not sell him. He will go around some place and dig up the money. (Standard Rec., Vol. II, pp. 194–195.)

Another witness having thirty-two years' experience in the gasoline trade testified:

Q. . . . What do you think is the rule that ought to determine the number of gasoline distributing centers to be used by the public? I do not know whether I make that question clear.

A. You make it clear. I understand, but there is a large question involved there. I would answer that in this way. The free competition of unsubsidized agencies will provide the public with all proper and convenient facilities. (Standard Rec., Vol. II, p. 292.)

Still another witness says:

Q. Do you think that if the Commission were to order and enforce the cessation of this practice of leasing and loaning pumps under the tying contract for a nominal consideration that the result would be a disadvantage to the public from the point of view of numerical number of distribution centers of gasoline products?

A. I do not, because I think the ordinary garage, if the practice was discontinued, from their own standpoint, would put in that equipment just the same as they put in a vulcanizer, or anything else used in a garage.

Q. How about a smaller retailer, like the grocery man in the smaller communities?

A. I think he would put in the equipment necessary to distribute it, depending upon the amount he was distributing. (Standard Rec., Vol. III, p. 293.)

A number of substantial companies have adopted the practice solely because their trade was being taken away from them by competitors who were making loans of equipment to their customers. (Standard Rec., Vol. II, p. 528; Vol. III, pp. 13–14, 265–266.)

Further evidence that there will be no dearth of equipment if the practice is discontinued is found in the fact that the practice appears not to have found its way into that part of the country lying west of the Mississippi River. (Stand. Rec., Vol. III, p. 241.) The court may take judicial notice of official statistics which show that the number of automobiles per thousand inhabitants is greater in the western part of the United States than in the eastern. Respondents would probably not contend that the farmers of Minnesota and Iowa, the fruit growers of the Pacific Coast, or the automobile makers of Michigan (Standard Rec., Vol. II, pp. 407–408) have needed any of the advantages or conveniences in the use of their automobiles which have been enjoyed by the residents of the East.

In the light of the testimony above quoted (supra, pp. 54–56), to the effect that a sale of equipment can be effected if there is prospect of sufficient gasoline to justify it, there can be no doubt that the sale force of the companies engaged in the manufacture and sale of equipment, as well as the salesmen of the oil companies which sell equipment, as distinguished from loaning it, will see to it that sufficient equipment is installed to meet public convenience. (Standard Rec., Vol. II, pp. 152–153–291.)

It is submitted, therefore, that the holding of the Circuit Court for the Third Circuit to the effect that the inevitable result of sustaining the Commission's order would be to reduce the number of curb stations is not supported by the record.

If without the loaning practice with restrictive covenant sufficient equipment will be installed to meet the convenience of the public, then any installations beyond this will not only not result in benefit to the public but will tend to impose undue burdens upon consumers. The cost of the equipment put out by the wholesale marketing companies, as well as the cost of the operating of the retail stations, must ultimately be reflected in the price of gasoline to the consumer, and where unnecessary installations are made in large numbers this additional cost may be appreciable. There is considerable evidence in the record showing that in some localities more installations are being made than are required either for public convenience or for economical distribution to the wholesale marketers. (Stand. Rec., Vol. II, p. 78, 134, 261, 262, 300, 301, 307, 312, 365–367, 216–217, 268.)

2. Loaning practice not necessary to obtain ample storage capacity.

What has been stated under the heading immediately preceding clearly demonstrates the unsoundness of respondents' contention that they must follow the practice of loaning equipment with the restrictive covenant in order to secure the installation of sufficient storage capacity by dealers to render respondents' distribution economical. In this connection particular attention is invited to the testimony of Mr. Leonard, of the Atlantic Refining Company, who personally made a survey of the entire territory served by his company (Pennsylvania and Delaware), studied every town of 2,000 inhabitants or more, and made a computation of storage requirements for each locality. This survey was made with a view of determining what increase in storage capacity and distribution machinery was necessary to meet the expected immense increase of consumption by auto trucks. The result was a definite campaign by the company to increase storage and particularly to install pump and tank equipment upon good locations. (Standard Rec., Vol. II, p. 553.) His experience is, therefore, particularly convincing to the end that of the many equipments that they succeeded in installing they were able to sell four out of five. (Standard Rec., Vol. II, p. 584.) If it had not been known by everyone, as he pointed out, that the company would lend freely if unable to sell, it is evident that the sales would have been practically universal (Standard Rec.,

Vol. II, p. 560) and entirely without resort to the practice condemned by the Commission. Despite, or perhaps because of, his full knowledge on the subject Mr. Leonard's company prefers to sell equipment to lending it.

3. Loaning practice with restrictive covenant not necessary to protect brands.

Respondents claim that leasing equipment at a nominal consideration with restrictive covenant is the only means by which they can adequately protect their trade names and brands; that unless they be permitted to follow the practice retail dealers will sell the product of one wholesale marketer through equipment bearing another's mark and thus mislead the buyer. This practice contemplates, of course, deliberate substitution and misrepresentation by the dealer. The evidence clearly refutes this contention.

For the purpose of clearly understanding the practice obtaining where the retail dealer owns his equipment, it should be stated here that in such cases the dealer uses an illuminated globe connected with the pump which sometimes carries the name of the gasoline dispensed through the equipment, but in many instances merely carries the word "gasoline" thereon. In the latter case a painted sign in close proximity to the equipment usually indicates the brand of the gasoline dispensed. If the dealer changes the brand sold through the particular equipment, he promptly removes the illuminated globe or painted sign and substitutes one which shows the gasoline sold. The

wholesale marketer who loses a retailer as a customer will see to it that his sign is removed when the dealer no longer sells his gasoline. (Standard Rec., Vol. II, p. 493; Vol. III, p. 140, 22–23; Vol. II, p. 516–517, 500, 493; Vol. III, p. 32–34.)

The claim that retail dealers do not change their signs but display the sign of one wholesale marketer while dispensing the gasoline of another is refuted by direct evidence in the record. (Standard Rec., Vol. II, pp. 487–488.) There is in addition a substantial amount of evidence showing that marketers of widely advertised brands owning valuable trademarks and trade names who have engaged to some extent in the leasing practice prefer to sell rather than lease equipment. This preference would certainly not exist if the leasing practice were necessary to protect brands. (Standard Rec., Vol. II, pp. 561–682, 558–559, 560, 584, 588, 590, and 472.) Nor can it be assumed that western marketers have no protection for their brands.

Witnesses further testified that there is no relation between the leasing and loaning practices and the proper advertisement of brands in connection with sales at retail. (Standard Rec., Vol. II, pp. 33–34; Id. II, p. 469; Vol. III, p. 140.)

Timely removal of the sign if the retailer changes brands of gasoline is all that is required to protect the trade name. (Standard Rec., Vol. II, pp. 516–517, 500, 493.)

Finally, there is apparently not any company which sells its entire output to dealers through equip-

ment installed by the seller with the covenant to distribute the vendor's gasoline only. All companies are willing and anxious to sell to dealers who own their own equipment and display the refiner's or wholesale marketer's sign, and the danger that some other refiner's product will be substituted for theirs does not deter them either from selling to such dealers or from furnishing their trade-mark signs to be used in connection with the retailer's business.

In connection with this point it may be added that any manufacturer of a liquid or staple commodity who sells to the trade in bulk necessarily incurs the risk that dishonest dealers may sell the products of other manufacturers under the representation that they are his. Be it said to the credit of the trade, however, that in the instant case the record shows that substitution of gasoline of one refiner or wholesaler for that of another is very rare. The wholesale marketer has ample redress in the courts for such isolated cases as may occur, and he may not substitute for this remedy contracts for exclusive dealing which may substantially lessen competition or tend toward monopoly.

4. Security in handling gasoline does not require the loaning of equipment.

That the further advantage of security in handling, supposed result from the loaning practice, vanishes upon consideration is similarly evident. The safety obtained is solely inherent in the pump and tank

equipment as an improvement upon the five-gallon can, the barrel, and the drum. It does not consist in the lease or the loan with restrictive covenant.

It is clear throughout the record that in no event will the trade or the public consent to return to the old type of equipment. (Standard Rec., Vol. II, pp. 277, 310.)

5. The loaning of equipment is not necessary to economy.

There is much to show that the curb pump and tank at convenient points conduces to low cost of delivery. The experience of the Atlantic company is absolutely conclusive upon this point. It is shown that practically the only way in which economy can yet still be effected is by lowering the costs of delivery and having equipment installed at points where deliveries can be made with regularity and infrequency. (Standard Rec., Vol. II, p. 551.) But installation of the equipment with sufficient storage capacity can be made businesslike to a prospective purchaser thereof, and the success of the Atlantic company and the manufacturers of the equipment in selling equipment (ante, pp. 53-56) shows that the loaning practice is not essential.

6. Nor is loaning of equipment necessary to public convenience.

By the same token it follows that the public has not the slightest interest to maintain the gratuitous loaning of equipment or the restriction of competition by a clause in the lease. We have shown that the

interest is to the contrary. The public is interested in seeing that it can buy good gasoline at convenient points from convenient equipment—that is, at curb pumps or service stations—but not in having the equipment tied to particular corporations.

7. The securing of "gallonage."

Practically all the corporations doing this business whose witnesses were examined at any length testified that one of the advantages from the practice was the obtaining of gallonage. We shall forbear quotation, since the fact will certainly not be controverted.

If it be necessary or even advantageous to restrict dealers to the use of equipment for the product of a company in order to obtain gallonage, what deduction should be made from such fact?

The company restricting its dealers from purchasing elsewhere is proposing, by the restrictive clause, to hold business and keep up gallonage artificially. Otherwise they would be agreeable to the equipment being owned by the individual dealer, as contrasted with the plan centering in the restrictive covenant. We have shown that the management of the Atlantic Refining Company prefers to make outright sales of equipment to loaning, and we have further shown that this company has not found it necessary to bind the dealer in order to secure the advantages which we have discussed above. (Ante, pp. 53–54.)

The same, however, can not be said of the desires of the companies who are asking for review of the

order of the respondent Commission. That they not need the restrictive covenant as a protection their brands, or to secure adequate facilities, etc., evident from the facts and evidence above outline But they are desirous of securing the restrictive cov nant and keeping the control of the equipme placed with dealers, in order to maintain their ga lonage. This can only mean that if the deal owned the equipment he would be free to deal els where and might exercise his liberty, and their ga lonage suffer accordingly. It is from this admitte and obvious point of vantage that the restricti covenant assumes a sinister aspect as regards i effect upon competition.

8. The control of the trade of the individual deale to whom equipment is loaned.

This last-named advantage, existing solely from the standpoint of the loaning corporation, is tha wherein the disadvantage to the public is clearly ob vious. Although the large companies, opposing th order of the Commission, deny that their object is t monopolize the trade of each individual dealer, it can not be glossed over that the benefit to their gallonag resulting from the practice is due solely to the monop lization of individuals. There is no criticism agains any company increasing or protecting its gallonage or securing "its share," or a lion's share, of the trade provided always that no restrictive methods of com petition are employed. But restrictive covenants in many thousands of loan agreements clearly con

stitute the adoption of a fixed policy counter to the law as outlined above. In this connection we quote from the testimony of Mr. Frech, manager of the White Star Oil Company:

> Q. Now, I am directing your attention to those cases alone where the garage man would buy the pump if you or somebody else did not loan him one. In those cases it would be to your economic interest or not, do you think, to loan a pump to such an individual if no one else were likely to loan one; or, put it, if no one else did or would loan him a pump?
>
> A. Well, I do not know about that. I think if no other oil company loaned pumps and we did loan it we would get more business if we did loan them.
>
> Q. Then in that case that advantage would come from the monopoly you would derive?
>
> A. Yes.
>
> Q. So that one of the reasons for leasing and loaning these pumps is that you thereby monopolize the business of your customer?
>
> A. Sure; that is one of the reasons.
>
> (Standard Rec., Vol. III, p. 65.)

V.

EFFECT OF SUSTAINING COMMISSION'S ORDER UPON INVESTMENT OF RESPONDENT COMPANIES IN EQUIPMENT.

Respondent companies have raised the question of the effect of sustaining the Commission's order upon investment in loaned equipment. We submit that the result will not, and can not, conceivably be to the financial detriment of the respondents, save as finan-

cial return inheres in the exclusive covenant. If the orders are sustained, the retail dealers will have no irritation as against these petitioners or such marketing company as may have loaned them equipment. They will be obliged to terminate the loaning contract and will consequently desire to buy equipment for the purpose of continuing their business. Whose equipment will they be most likely to buy—that of some other corporation? Or will they follow the line of least resistance and purchase the equipment already installed on their premises?

It is obvious that they will much prefer to purchase the equipment already on the ground and will tend, if satisfied, to continue to do business with the corporation which has the equipment on their premises for sale, but thereafter only upon a free competitive basis.

Let us suppose that a considerable proportion of these dealers attempt to buy the equipment for less than its cost minus depreciation. If this prove to be true, and the company owning the equipment be obliged to sell at less than the present actual worth, it nevertheless appears that every dollar which the company receives for the equipment is a dollar more than it would have received if the Commission's order had not been sustained, disregarding for the moment the nominal consideration for the loan, which is seldom collected and is negligible if it be paid.

The loaning companies will actually be benefited in that they will receive compensation for what otherwise would be a total loss at the end of the five to ten

year period which constitutes the life of this class of equipment. (Standard Rec., Vol. II, p. 64.) They lose control only.

VI.

RESPONDENTS ARE ENGAGED IN INTERSTATE COMMERCE.

It was alleged in the Commission's complaint that the various companies, here respondents, purchased both equipment and gasoline and transported the same in interstate commerce and that, in the conduct of their respective businesses, the equipment and products are constantly moving from one State to another in a constant current of trade in such products. (Standard Rec., Vol. 1, pp. 4, 5; Maloney Rec., Vol. 1, pp. 3, 5; Gulf Rec., Vol. 1, pp. 3, 4, 5.)

The answer of the Standard Oil Company of New Jersey admits that it is engaged in interstate commerce, both in petroleum products and in equipment. (Standard Rec., Vol. 1, par. 2, p. 8.) Both the Gulf Refining Company and the Maloney Oil & Manufacturing Company admit in their answers that they are engaged in the manufacture and sale of petroleum and petroleum products in interstate commerce. (Gulf Rec., Vol. 1, par. 7, p. 9; Maloney Rec., Vol. 1, par. 2, pp. 7, 8.) Both the Gulf and the Maloney Companies, however, contended in the court below that the leases of equipment are made in connection with the sale to retail dealers of gasoline which has come to rest in the State before sale by respondents

from tank wagons, and that the Federal Governmen is therefore without any jurisdiction over these trans actions. Petitioner contends, on the other hand, tha the sales by respondents of gasoline and equipmen shipped from States other than those in which sale are made are a part of interstate commerce.

In this relation the petitioner makes the following points:

1. That the leasing contracts contemplate and necessitate the importation by respondents of gaso line into a number of the States to supply the trade of dealers and are therefore a part of their interstate commerce;

2. That even if the leasing contract be deemed only initiatory of sales of gasoline rather than providing for such sales, nevertheless the contracts are a part of interstate commerce. They are more intimately connected with sales of gasoline than mere negotiations leading up to such sales, and such negotiations are consistently held to be a part of interstate commerce;

3. That the respondents' sales from tank wagons of gasoline habitually transported by them from other States for the purpose of such sales are a part of interstate commerce and that the original package doctrine is not applicable to take such sales out of interstate commerce.

1, 2. The leasing contracts are a part of respondents' interstate commerce.

Discussing the first two points above outlined, it is submitted that where a corporation has its principal office and place of business in one State and enters into contracts through its sales agents in other States to sell to persons in such States, and such contracts require for their fulfillment the transfer of commodities so sold from other States, the shipment and sales so made are interstate commerce and the contracts are a part of such commerce. (*Crenshaw* v. *Arkansas*, 227 U. S. 389; *Robbins* v. *Shelby County Taxing District*, 120 U. S. 489; *Stewart* v. *Michigan*, 232 U. S. 665; *Rearick* v. *Pennsylvania*, 203 U. S. 507; *Dozier* v. *Alabama*, 218 U. S. 124; *Davis* v. *Virginia*, 236 U. S. 697.)

The contracts by which the respondents lease or lend equipment and by the terms of which the dealers agree to purchase all oil sold through such equipment from respondents are a part of respondents interstate commerce in gasoline and other refined products and as such are subject to Federal regulation. The competition lessened is competition between respondents and other marketing companies doing a like business. The effect of the exclusive terms of the contract is to restrain, prevent, or curtail importation of gasoline by competitors in interstate commerce into the several States covered by respondent companies.

The delivery by respondents from day to day of quantities of gasoline required by the dealers under contract, at the current market price, are in performance of the contracts previously entered into, which require the respondents to supply all the gasoline sold through the equipment loaned or leased and obligate the dealers to purchase from the respondents all gasoline so sold.

3. Respondents' sales from day to day are a part of their interstate commerce.

But if the contracts under which equipment is leased and which bind the dealers to purchase petroleum products from respondents are held to fall short of contracts for the sale of gasoline, it is contended that respondents' sales from their storage tanks form a part of interstate commerce in gasoline.

Where a corporation, having its principal place of business in one State but having a great sales organization extending over a number of States, purchases a commodity in various States in large quantities, ships it into various other States and there sells it and where this is a typical, constantly recurring course, the sales thus made are a part of interstate commerce in the commodity and subject to Federal regulation. It was so held by this court in *Swift & Co.* v. *U. S.*, 196 U. S. 375, where the court said:

> When cattle are sent for sale from a place in one State, with the expectation that they will end their transit, after purchase, in another

> and when in effect they do so, with only the interruption necessary to find a purchaser at the stockyards, and when this is a typical, constantly recurring course, the current thus existing is a current of commerce among the States, and the purchase of the cattle is a part and incident of such commerce. What we say is true at least of such a purchase by residents in another State from that of the seller and of the cattle. And we need not trouble ourselves at this time as to whether the statute could be escaped by any arrangement as to the place where the sale in point of law is consummated.

This decision is in accord with other decisions of this court. (*Hopkins* v. *U. S.*, 171 U. S. 578, 590; *Standard Sanitary Mfg. Co.* v. *U. S.*, 226 U. S. 20, 49.)

This court has very recently fully considered whether purchasers and sales of commodities transported in interstate commerce are a part of such commerce and has reaffirmed and possibly extended the doctrine announced in the Swift case. (*Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U. S. 282, 290, 292; *Eureka Pipe Line Co.* v. *Hallanan*, 257 U. S. 265; *United Fuel Gas Co.* v. *Hallanan*, 257 U. S. 277; *Lemke* v. *Farmers Grain Co.* 258 U. S. 50.) In the Dahnke-Walker case the court says:

> Where goods in one State are transported into another for the purpose of sale the commerce does not end with the transportation, but embraces the sale of the goods after they reach their destination and while they are in

> the original package. (*Brown* v. *Maryland*, 12 Wheat. 419; *American Steel & Wire Co.* v. *Speed*, 192 U. S. 500, 519.) * * * The State court, stressing the fact that the contract was made in Kentucky and was to be performed there, puts aside the further fact that the delivery was to be on board the cars and that the plaintiff, in continuance of its prior practice, was purchasing grain for shipment to its mill in Tennessee. We think the facts so neglected had a material bearing and should have been considered. They show what otherwise seems an intrastate transaction was a part of interstate commerce.

If the purchase of a bulk commodity such as wheat in one State, where it is proven that the habitual course of business is to transport the commodity so purchased to another State, is a part of interstate commerce, it necessarily follows that the sale of such commodity by the purchaser, after shipment, in States other than those of their purchase, where this is a typical, constant recurring course of business and where the entire transaction of purchase, shipment, and subsequent sale is carried on by the same organization, is likewise a part of interstate commerce. No possible difference in principle can be found between the purchase in one State for shipment in interstate commerce and the shipment for sale at destination in another State.

4. Original-package doctrine is not applicable.

The fact that gasoline and other petroleum products purchased by respondents in various parts of the United States and shipped into the States other than those of purchase for sale to retailers are stored in the States to which shipped and delivered as ordered by customers does not preclude the Federal Government from regulating such sales and contracts made in connection therewith. The original-package doctrine was announced for the first time in *Brown* v. *Maryland* (12 Wheat. 419), where it was held that the importer of goods was necessarily entitled to the right to sell them and that the States could not impose a tax as a condition of the exercise of the right. The decision, therefore, upheld the right of the importer to sell that which he had purchased in interstate commerce free from state restrictions thereon.

The business of respondents is essentially different from that of local dealers in a great variety of package goods, who purchase some parts thereof without the State and some from within it, and, breaking the packages, mingle the goods upon their shelves. These respondents handle a single line of products, a liquid commodity which they ship into the various States in bulk, place in their own storage, and sell from such storage by tank wagons. Until sold by respondents it never becomes mingled with the goods within the State, as does the stock of broken package goods of local dealers. Under the facts here pre-

sented the right of respondents to sell from their own storage, we contend, is insured by the commerce clause of the Constitution, and this right is not lost by the fact that respondents draw the commodity from storage and transport it to customers in their tank wagons. The sale thus made is nevertheless a sale of a commodity imported into the State by the importer of the commodity, and the commodity does not lose its identity as an article of interstate commerce until within the hands of the first purchaser within the State.

5. Cases upholding the power of the State to tax are not in point.

Counsel for respondents in the court below rely upon cases which relate to the point in course of interstate commerce at which the right of the several States to tax commodities attaches. Decisions in cases of this character have been frequently distinguished by this court from those turning upon the question of the jurisdiction of Congress to regulate interstate commerce and of agencies created by Congress for the enforcement of laws intended to preserve competition and prevent monopoly. (*Lemke* v. *Farmers Grain Co.*, 258 U. S. 50; *Addyston Pipe & Steel Co.* v. *U. S.*, 175 U. S. 211, 245; *American Steel & Wire Co.* v. *Speed*, 192 U. S. 500, 521; *Swift & Co.* v. *U. S.*, 196 U. S. 375, 378.)

6. The tendency toward monopoly disclosed by the record is a monopoly of interstate commerce.

The consequence of the use, if continued, of the contracts challenged by the Commission in these proceedings will be to acquire for the respondents an increasingly large amount of shipments of gasoline and other petroleum products from various States of the Union into the State in which these respondents sell and of the sales in those States of those commodities. The monopoly of this business is so obviously a monopoly of interstate commerce that citation of authorities would hardly be more convincing than the bare statement. He who acquires complete control of the shipment of an important article of commerce from various States into a group of States and of its sale in the States to which he ships it monopolizes interstate commerce in such commodity within the meaning of the Sherman law, and the tendency toward such control is a tendency toward monopoly in interstate commerce and a lessening of competition in such commerce. Authorities cited herein (ante, pp. 42–43) show that the monopolization of, or restraint of trade in, a much less substantial amount of commerce in a given article and in a much smaller area geographically than is here shown is sufficient to constitute a violation of the Sherman law. (See also *Ramsay* v. *Associated Bill Posters*, decided by this court January 2, 1923.)

VII.

THE RETAIL DEALERS WERE NOT NECESSARY PARTIES TO THE COMMISSION'S PROCEEDINGS.

The retail dealers in gasoline, having equipment under lease, were not necessary parties to the Commission's proceedings. This court held in *U. S. v. United Shoe Machinery Co.* (decided April 17, 1922) that shoe manufacturers leasing machinery from the shoe machinery company were not necessary parties to a suit in equity instituted by the Attorney General under section 3 of the Clayton Act to test the validity of the leasing contracts, the court saying in part:

> The relation of indispensable parties to the suit must be such that no decree can be entered in the case which will do justice to the parties before the court without injuriously affecting the rights of absent parties. *1 Street's Equity Practice*, 519, quoted with approval in *Waterman v. Canal-Louisiana Bank Co.*, 215 U. S. 33, in which case the former adjudications in this court are cited and considered. The covenants enjoined were inserted for the benefit of the lessor, and were of such restrictive character that no right of the lessee could be injuriously affected by the injunction which was prayed in the case. We are of opinion that their presence was not necessary to a decision.

This reasoning is applicable in the instant case.

There are additional and conclusive reasons why the lessees are not necessary parties to a proceeding

by the Commission to prevent violations of section 3 of the Clayton Act.

The Commission is a statutory body having only those powers specially conferred upon it by statute or such powers as may reasonably be implied from those expressly granted.

By section 11 of the Clayton Act, the Commission is authorized to issue its complaint against any person whom it has reason to believe is *violating* or has violated sections 2, 3, 7, or 8 of that act. Furthermore, the Commission's order to cease and desist is to be entered, after hearing, against the person *violating* the act. It will be observed that the condition prohibited is that the lessee or purchaser shall not use or deal in the goods of a competitor or competitors of the lessor or seller. Clearly such a condition would not be sought by the lessee or purchaser. A study of the section reveals therefore *that its prohibitions are directed only against the person making the sale or contract for sale or leasing the machinery, etc.*

It was the large manufacturer, the large producer, the extensive dealer who was introducing these clauses into his contracts. It was against such manufacturers or dealers that the statute was directed. Furthermore, the effect which renders the making of the prohibited contracts unlawful is that it substantially lessens competition. A single retail dealer or wholesaler could not substantially lessen competition by entering into such a contract, and therefore could not violate the statute.

It follows from the above that since the Commission is directed to issue its complaint and order only against the person violating the statute it has no authority to issue a complaint against the vendees or lessees, parties to such contracts, who have clearly not violated the law.

The Court of Appeals for the Seventh Circuit clearly erred in holding that the lessees were indispensable parties.

CONCLUSION.

The judgments of the courts below should be reversed and the Commission's orders sustained.

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